

OLIVIA DE HAVILLAND LOSES SUIT

By Mark Litwak

Actress Olivia de Havilland's lawsuit against FX Networks over her depiction in the mini-series *Feud: Bette and Joan* has ended with the U.S. Supreme Court rejecting her petition to review a California appeals court's dismissal of her case.¹ At this point she appears without any other avenues to pursue her claim. The decision will help filmmakers defend themselves when portraying real individuals in their films without a release.

De Havilland objected to her portrayal in a docudrama about stars Bette Davis and Joan Crawford. The series explains the competition between Hollywood's leading ladies of the day, Bette Davis and Joan Crawford, for film, attention, awards, and critical acclaim. Catherine Zeta-Jones played de Havilland, who was a close friend of Davis. De Havilland alleged that the producers violated her right of publicity, the common law tort of misappropriation and for false light invasion of privacy based on FX's portrayal in the docudrama of a fictitious interview and the de Havilland character's reference to her sister as a "bitch" when in fact the term she used was "dragon lady." De Havilland sought to enjoin the distribution and broadcast of the series as well as recover money damages. De Havilland never signed a release or gave permission for her to be portrayed in the series.

The trial court denied FX's motion to strike the complaint. The court concluded that, because *Feud* tried to portray de Havilland as realistically as possible, the program was not "transformative" and therefore not entitled to First Amendment protection. Under such reasoning many books, films, plays, and television programs that accurately portray real people could be liable. The California Court of Appeal, however, reversed the trial court ruling stating that under the First Amendment "Whether a person portrayed in one of these expressive works is a world-renowned film star -- "a living legend" -- or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people."

The Court of Appeal explained:

The case is another example of how filmmakers can often portray third parties without their permission, even if some of the details may be incorrect.

Producers of films and television programs may enter into agreements with individuals portrayed in those works for a variety of reasons, including access to the person's recollections or "story" the producers would not otherwise have, or a desire to avoid litigation for a reasonable fee. But the First Amendment simply does not require such acquisition agreements. (*Polydoros, supra*, 67 Cal.App.4th at p. 326

¹ *De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845 [230 Cal.Rptr.3d 625].)

[“[t]he industry custom of obtaining ‘clearance’ establishes nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits such as this one”]; cf. *Rosa & Raymond Parks, supra*, 812 F.3d at p. 832 [privilege based on state constitution’s free speech guarantee was not “contingent on paying a fee”].) The creators of *The People v. O.J. Simpson: American Crime Story* can portray trial judge Lance Ito without acquiring his rights. *Fruitvale Station*’s writer and director Ryan Coogler can portray Bay Area Rapid Transit officer Johannes Mehserle without acquiring his rights. HBO can portray Sarah Palin in *Game Change* without acquiring her rights. There are myriad additional examples.

The Appellate court reversed the trial court and further held that depiction was transformative. The court found that de Havilland did not show that she could not prevail on a false light claim because the challenged scenes, in which she was shown giving a fictitious interview on the theme of powerful men misusing women in Hollywood and making a light-hearted reference to another celebrity’s drinking, were not defamatory. And a remark replacing “dragon lady” with “bitch” was not highly offensive to a reasonable person. The order denying the motion to strike was reversed.

In conclusion the Appellate court stated:

The trial court's ruling leaves authors, filmmakers, playwrights, and television producers in a “Catch-22.” If they portray a real person in an expressive work accurately and realistically without paying that person, they face a right of publicity lawsuit. If they portray a real person in an expressive work in a fanciful, imaginative—even fictitious and therefore “false”—way, they face a false light lawsuit if the person portrayed does not like the [*871] portrayal. “[T]he right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals.” FX's evidence here—especially the docudrama itself—establishes as a matter of law that de Havilland cannot prevail. “[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable.” (citations omitted).

The trial court was directed to enter a new and different order granting the motion and awarding defendants their attorney fees and costs. The United States Supreme Court has discretion which cases to hear and denied reviewing this case. You can read the full appellate case [here](#).

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